6/13/91

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
ROHR INDUSTRIES, INC.,) Docket No. EPCRA-1089-04-08-325
)
Respondent)

ORDER GRANTING ACCELERATED DECISION

ON LIABILITY AND PENALTY

For the reasons stated in its motion of January 28, 1991[1], complainant, pursuant to 40 C.F.R. § 22.20, seeks an accelerated decision in this matter both on issues of liability and penalty. Respondent served its opposition to the motion on February 11. Complainant replied to the opposition on February 22, and it submitted a supplemental reply on March 8. Respondent served a response to the reply on March 18, and this was followed by complainant's submission of April 26. The arguments have been examined and evaluated by the below Administrative Law Judge (ALJ), and are well known to the parties; they will not be repeated here.

At the outset, the determination of whether or not the subject matter is amenable to an accelerated decision hinges upon the

[1] All dates are for the year 1991 unless otherwise indicated.

interpretation of the Consolidated Rules of Practice, 40 C.F.R. § 22.20 (Rule) and applicable law. The Rule provides in pertinent part, as follows:

> (a) <u>General</u>. The Presiding Officer, upon motion of any party . . . may . . . render an accelerated decision in favor of the complainant or respondent, as to all or any part of the proceeding, . . . if no <u>genuine issue of material fact exists</u> and a party is entitled to judgment as a matter of law . . . . (emphasis supplied)

Oral hearings should be used to resolve issues of material facts. The Rule, in part, exemplifies this.[2] An accelerated decision is similar to that of summary judgment, and not every factual issue is a bar. Minor factual disputes would not preclude an accelerated decision. Disputed issues must involve "material facts" or those which have legal probative force as to the controlling issue. A "material fact" is one that makes a difference in the litigation.[3] For the reasons mentioned below, genuine issues of material facts are absent from this proceeding. Also, a party is not necessarily entitled in all contested cases to an oral hearing. Due process is not a fixed star in the constitutional constellation. It has been enunciated by the Supreme Court that only "some form of hearing" is required where property rights are involved, and that the requiring of an evidentiary judicial type hearing upon demand in all cases would entail fiscal and administrative burdens out of proportion to any

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[2] <u>See generally</u>, 3 Davis, Administrative Law Treatise, § 12.2 2d Ed. (1980).

[3] <u>Words and Phrases</u>, "Material Fact."

countervailing benefits. "The judicial model of an evidentiary hearing is neither required, nor even the most effective method of decision-making in all circumstances. The essence of due process is that 'a person in jeopardy of serious loss [be given] notice of the case against him and the opportunity to meet it.'" Mathews v. Eldridge, 424 U.S. 319, 333, 347-349 (1976).

The one count of the complaint charges respondent with failure to submit a timely, complete and correct Toxic Chemical Release Inventory Reporting Form for the calendar year 1987 for the chemical 1,1,1 Trichloroethane; it being charged further that respondent's failure was in violation of the section 313 of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), 42 U.S.C. § 11023, and 40 C.F.R. Part 372. The record shows that the respondent failed to submit the required form. Stripped to its bare bones, respondent's failure was due to an error in converting the quantity of the chemical used from gallons to pounds. (Respondent's submission of March 18, at 5; affidavit attached to submission at 2-3). The error committed by respondent is not a defense to liability. It is concluded that respondent is in violation of the aforementioned section of EPCRA, and cited regulations.

The proposed penalty of $17,000 sought by complainant is condign. Among its pleadings, complainant has attached two significant documents. The first of these is complainant's proposed exhibit 14, which is the Enforcement Response Policy (Penalty Policy) applicable to respondent's violation. The second

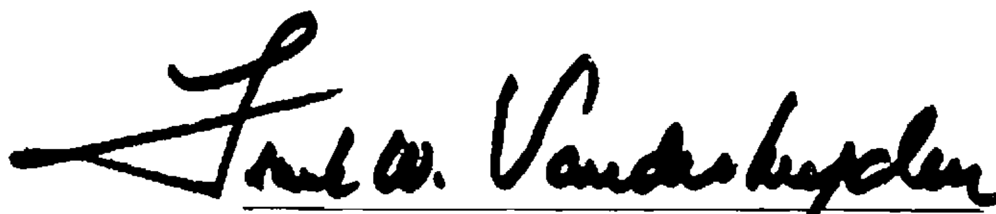
is a lengthy memorandum, consisting of nine pages, drafted by Philip Wong (Wong). This document, which is clear, complete and persuasive, explains the rationale on calculating the $17,000 proposed penalty. There is also a third document of importance. This is Wong's affidavit of January 28 buttressing his memorandum. Another pertinent section of the Rules of Practice, 40 C.F.R. § 22.27(b), provides in significant part, that the ALJ in determining the penalty shall consider the criteria set forth in EPCRA and the Penalty Policy. The factors to be considered in assessing a penalty, set forth in section 325 of EPCRA, 42 U.S.C. § 11045, and those in the Penalty Policy were considered and weighed by Wong. The ALJ finds Wong's explanation convincing and he adopts his conclusions.

IT IS ORDERED that:

1. Complainant's motion for an accelerated decision on both the issues of liability and penalty be **GRANTED**.

2. Not later than 40 days of the below service date, complainant shall prepare and serve a proposed draft of the accelerated decision upon the ALJ for his review, possible to probable revision, and signature. The penalty assessed is to be $17,000, and the draft shall be complete in its Findings of Fact, Conclusions of Law. To assist the complainant concerning the form of the accelerated decision, there is attached for its convenience such a decision, In the Matter of Environmental Protection Corporation (East Side Disposal Facility), Docket No. RCRA-09-86-001. It matters not that a different statute is involved, as the

attached decision is for style purposes only and can be adapted to the subject proceeding. In this regard, complainant is directed, unlike in the attached decision, to draft the Findings of Fact in narrative and not numerical form, and the civil penalty discussion and the rationale for the penalty should be discussed completely. Complainant is also directed to forward with its draft, the computer disk, done in Wordperfect 5.0, used in the accelerated decision.



Frank W. Vanderheyden
Administrative Law Judge

Dated: Jan. 13, 1991